NO: 83-1836

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

MELVIN M. BURTON, JR.
A Member of the Bar of the
District of Columbia Court of Appeals

PETITIONER,

VS

BOARD ON PROFESSIONAL RESPONSIBILITY OF
DISTRICT OF COLUMBIA COURT OF APPEALS

RESPONDENT,

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Melvin M. Burton, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the District of Columbia Court of Appeals entered in the above entitled on January 11, 1984; petition for rehearing *en banc* denied on April 2, 1984.

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PARTIES

The parties to the proceedings in the District of Columbia Court of Appeals — the Court whose judgment is sought to be reviewed — were:

Melvin M. Burton, Jr.
a Member of the Bar of the
District of Columbia
Court of Appeals
(Petitioner herein)

and

Board on Professional Responsibility
of the District of Columbia
Court of Appeals
(Respondent herein)

QUESTIONS PRESENTED

1. Whether a newly defined definition for Disciplinary Rule 9-102 (A) (now renumbered 9-103 (A), can be applied to conduct occurring before the adoption of the new definition or whether this retroactive effect is therefore *Ex Post Facto* and violative of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

2. Where, under the newly adopted standard for Disciplinary Rule 9-102 (A), the prescribed sanction is that of disbarment, yet, the sanctions imposed thereunder ranged from suspensions to disbarment for similar conduct, has there been disparity in the imposition of sanctions which is violative of the due process requirement of the Fifth Amendment to the Constitution of the United States.

3. Has there been a violation of the Due Process requirement under the Fifth Amendment when the Board on Professional Responsibility is not estopped from using evidence of a prior adjudicated disciplinary proceeding to assist it in its determination in á new and unrelated proceedings.

4. Does the denial of the right for a Respondent to conduct a *voir dire* of hearing panel members, which right is granted pursuant to Disciplinary Rule, Chapter 8, Section 3 (1) c, violate due process and the Respondent's Fifth Amendment and Sixth Amendment Rights.

5. Does the Board of Professional Responsibility possess quasi-judicial authority, so as to empower it to conduct a hearing on the conduct of a Court Appointed Trustee, (The Respondent herein), where the Court has been to

consider referring the matter to the Board on Professional Responsibility, but does not do so.

6. Where the evidence presented against a Respondent is not clear and convincing but the Board on Professional Responsibility makes a finding that substantial evidence was present to support its finding, has the Board on Professional Responsibility afforded a Respondent the due process required in Disciplinary Proceedings.

7. In reviewing a disciplinary proceedings, does the Due Process Clause of the Fifth Amendment require the reviewing authorities (i.e., the Board on Professional Responsibility and the District of Columbia Court of Appeals) to utilize a standard to support their findings a test greater than the substantial evidence standard.

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OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals was reported on January 11, 1984 (D.C. App. 1984) and is printed in the Apendix "A"

The Order of the District of Columbia Court of Appeals denying the Petition of Respondent below for Rehearing *En Banc* was reported on April 2, 1984, and is printed in the Appendix.

The Reports and Recommendations of the Board of Professional Responsibility are printed in the Appendix.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered in January 11, 1984. A timely petition for Rehearing *En Banc* was filed on January 24, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS STATUTES AND RULES INVOLVED

This case involves the Fifth and Sixth Amendments to the Constitution of the United States; Section 11-2502, 13-701(c) and 23-107 D.C. Code (1973), portions of sections 4, of Rule XI of the Bar Rules of the District of Columbia Court of Appeals; All of the relevant provisions are set for the Appendix to this petition.

STATEMENT OF THE CASE

Section 11-2502 of the District of Columbia Code vests the District of Columbia Court of Appeals with jursidiction over attorney discipline. To assist it in performing this statutory assignment, the Court has established and delegated to a Board of Professional Responsibility the authority to hear complaints of attorney misconduct, to report its findings and conclusions to the Court, and to make appropriate recommendations in connection therewith.[1] The Board in carrying out its Responsibility pursuant to its authority appoints hearing committees to conduct evidentiary hearings. With respect to the matters referred to it, a Hearing Committee submits a report to the Board setting forth the committee's findings, conclusions, and recommendations.[2]

Rule 10.4 of the Rules of the Board on Professional Responsibility states that with respect to the conduct of hearings by the Hearing Committee, that "Bar Counsel shall have the burden of proving violations of the disciplinary rules by clear and convincing evidence." Rule 12.6 of the Board's Rules states that "[w]hen reviewing the findings of a Hearing committee, the Board shall employ a 'substantial evidence on the record as a whole test." The Court of Appeals have stated in opinions that under its own rules it is "required to 'accept the findings of fact made by the Board unless they are unsupported by substantial evidence of record, . . . and must 'adopt the recommended disposition

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[1]Rules Governing the Bar of the District of Columbia, Rule XI, Section 4(1).

[2]Rules Governing the Bar of the District of Columbia, Rule XI, Section 4(3)(c).

of the Board unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or otherwise would be unwarranted.' D.C. App. R. XI, Sec. 7(3); *In Re Smith*, 403 A.2d 296, 302-303 (D.C. 1979)."

In its decision issued on January 11, 1984, a three-judge panel of the Court of Appeals for the District of Columbia concluded that Petitioner herein, Melvin M. Burton, Jr., had violated Disciplinary Rule DR 9-102(A) (now DR 9-103(A) (failure to deposit funds of a client in a separate account) and DR 1-102(A)(4) ("dishonesty, fraud, deceit, or misrepresentation").[3]

The Court ordered that the Respondent be disbarred. The Court's decision and order were consistent with the conclusions and recommendation of the Board on Professional Responsibility which had confirmed the report of the hearing committee in Case Nos. M-143-82; 83-492, and the report of the Hearing Committee in case Nos. 224-79; 245-81, where the Board on Professional Responsibility increase a Hearing Committee's sanction of Four (4) years suspension to that of disbarment.

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[3]Disciplinary Rule 9-102 (A) provides in pertinent part: DR9-102 Preserving Identity of Funds and Property of a Client.

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein...

Disciplinary Rule 1-102(A)(4) provides:

DR 1-102 Misconduct.

(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

The facts giving rise to the matter in Case No. 143-82; 83-492 are as following:

On February 9, 1979, pursuant to an Order of the Superior Court in Civil Action No. 7965-77 RP, (Wilkins et al, v. Anderson, et al), the Respondent was appointed as Trustee to sign on behalf of the heirs, a Deed conveying real property known as Lot 5, Square 397 as improved by premises 1535 9th Street, N.W., Washington, D. C.. Said premises were sold for the sum of $18,000.00

The Court Order appointing the Respondent as Trustee provided that the Respondent Trustee would convey the property, receive the proceeds after the discharge of emcumbrances, liens, costs, make appropriate adjustments as provided in the Contract of Sales, dated, November 23, 1976, and pay the proceeds into the registry of the Court. (Respondent's Exhibit #1). The Order neither provided for bond nor required an accounting by the Office of the Auditor, Superior Court of the District of Columbia.

The Respondent received the proceeds from the sale in the amount of $12,777.83, and although not required, opened another general Trust Account where said funds were deposited. All subsequent funds received from the transaction, were similarily deposited.

After receipt of the proceeds of the sale, Gladys Anderson, one of the beneficiaries of the proceeds to the Respondent for re-imbursement with regard to the property, a list of expenses incurred by her prior to the sale. Her Attorney, also presented for re-imbursement in connection with the property, expenses incurred by him prior to the sale. In order to get guidance on what expenses were proper for re-imbursement, the Respondent sort and received the guidance of the Deputy Auditor Master.

After getting the guidance of the Deputy Auditor, the Respondent was able to verify most of the expenses which had been presented for re-imbursement, made re-imbursement of the expenses verified, withdrew the Trustee Fee allowed per the Rules of the Superior Court and was prepared to deposit the remainder of the funds pursuant to the Order of Appointment into the Registry of the Court.

That before Respondent could make the deposit into the Register of the Court, the beneficiary, Gladys Anderson presented to the Respondent, additional expenses for re-imbursement. Being unable to resolve the conflict which arose with respect to whether the expenses were proper for re-imbursement, the Respondent after checking with the Auditor's Office decided to file an accounting with the Auditor's Office so that that office could make the determination as to which additional expenses could properly be re-imbursed, prior to depositing the funds into the Registry of the Court. Due to the delay in the Auditing process which took approximately one and one-half year to complete and because of the receipt of additional small sums of money representing unauthorized payment made by the Title Company and escrowed funds, the Respondent timely filed with the Auditor's Office, Three (3) additional accounts, reporting receipt of the additional funds.

That on or about November 14, 1979, while the Four (4) accounts were pending with the Auditor's Office, for auditing, when the Respondent was at Trial in the Superior Court defending a malpractice suit against the Estate of a deceased Attorney, the Respondent was approached at a recess by members of the Pailin family who were not parties to the on-going trial, who implored the Respondent to make payment of funds that may have been due to Ms. Pailin so

that she would be released from jail. A Superior Court Judge had ordered as a condition of Ms. Pailin's release that she deposit with the Court at least Seventy-five (75%) percent of any funds due her, which she had refused to do. The funds were due Ms. Pailin in another unrelated matter. Because of the difficulty of the Trial in which the Respondent was involved, the Respondent inadvertently caused to be paid to the Pailen family, the sum of $3,300.00 from the wrong trust account. The inadvertence occurred when the Respondent did not discern at that time that a secretary from his office, at Respondent's request, had brought to court for Respondent to sign, a check from the wrong Trustee account.

The Respondent did not discover that the check given to the Pailins had not come from his other Trustee Account, maintained at the same bank, until early December while reviewing his bank statements.

After completion of the Auditing process, the Auditor's Office requested proof of the amount of funds on deposit for which the Respondent was accountable. The Respondent presented to the Auditor, proof that the funds for which he was accountable were intact in the Trustee Account and at the same time explained to that Auditor the inadvertence which had occurred with respect to the Trustee Account. He also explained that during the period since the inadvertence, the Respondent had utilized the Account as a regular trust account and had deposited more than $40,500.00, into the account. The above amount however, did not include the deposit of $10,500.00, plus a return of the Trustees fee in the amount of $400.00. The Respondent, while Trustee was accountable at most for $13,000.00, and ultimately accountable for depositing unto the Registry of the Court, the sum

of $10,495.99, which funds were intact in the account when the Respondent was requested to submit proof of the funds on deposit and which amount was subsequently deposited into the Registry of the Court.

That a hearing was held on the irregularity in handling the account, and the Auditor Master's Report filed with the Court recommended that the Court," *consider referring the matter to the Committee on Professional Responsibility*". (Emphasis supplied)

That thereafter, the Court considered the Report of the Auditor-Master and approved the Report without a referral to the Committee on Professional Responsibility.

That on or about March 18, 1981, pursuant to an Order of the Court ratifying the Auditor-Master's Report, except for the referral to the Committee on Professional Responsibility, the sum of $10,495.99 was deposited into the Registry of the Court. The Court Order discharged the Respondent from his fiduciary Responsibilities upon his timely making the required deposit.

That at the Hearing before the Auditor Master on the irregular handling of the account, Respondent in testifying concerning the money he collected during the year 1979, when asked by the Auditor, gave the answer, in excess of $150,000.00.

That at the Hearing before the Hearing committee, the Respondent presented testimony that he had practiced law for 25 years, had a good standing at the Bar and that his reputation for truthfulness and honesty was of the highest quality.

Further, the Respondent presented testimony that there had been no prior history of the Respondent ever having to

appear before a Hearing committee and that he had performed invaluable community services without charge with community-based organizations as Chairman and Board Member of the Neighborhood Legal Services; Member of the Advisory Council for the District of Columbia, Small Business Administration; Chairman of the Board of Directors for Cromwell Academy, a private school in the District of Columbia: Co-Chairman of the 1972 Fund Drive for the Washington Cathedral; Chairman of an Ad Hoc Committee for the District of Columbia to make recommendations to Minimum Wages for Hotel and Restaurant Workers: Vice-Chairman, of the D.C. Coalition for Self-Determination; Co-Chairman of the Committee to Support the Advisory Neighborhood Councils (Now Advisory Neighborhood Commissioners); commenced in his office, internships for third year Howard University Law Students and served as counsel without charge for indigents during the 1968 Civil disturbances in the District of Columbia.

The facts showed that the Respondent had been active poitically in the Republican Party for the District of Columbia where he served as Vice-Chairman of the D.C. Republican Committee and that he has been involved in fund raisings for the United Way, NAACP and the Urban League.

Further, the facts showed that as an Attorney, the Respondent's reputation in the Office of the Register of Wills where he had handled more than 100 cases as either Guardian, Guardian Ad Litem, Conservator, Executor or the Attorney for others serving in those capacities was impeccable, without there ever being any impropriety, defaults, summary removal, bond revocation or any question concerning his handling of those matters. The facts showed

that the Office of Register of Wills on several occasions had appointed the Respondent to clear up matters of Estates handled by other Attorneys; that the Respondent was hired by an Attorney with the approval of the Office of Register of Wills to handle an estate matter involving multi-litigation including a malpractice claim against the Attorney's Estate and other matters, netting to the Estate, funds that were thought to be unobtainable and that as an Attorney, he performed diligently and acted in a responsible manner towards his clients.

The fact in Case No. 224-79; 245-81 are:

That during the course of the representation of Veterans Administration in property matters, which representation predated the year 1972, the Respondent, during the year, 1979, was requested by Veterans Administration as foreclosure Attorney to foreclose on a loan which was held by Veterans Administration on which the makers, Nathaniel and Loretta Pailin had defaulted.

That as a result of said foreclosure, on or about July 6, 1978, the Respondent received a check from the settlement company, District Realty Title Insurance Corporation in the amount of $26,378.16. That said funds (less a deduction of $1,505.90, not here in question) were placed in "Trust Account" No. 3-045-80-3, with the National Bank of Washington.

After depositing the check, on or about July 15, 1978, the Respondent paid to Veterans Administration, the sum due it of $16,639.68 and presented to Veterans Administration a preliminary distribution statement pending a complete distribution which would show in what manner the funds after payment to Veterans Administration were to be distributed.

That subsequently, because of delay, due to inability to locate Mr. & Mrs. Pailin, and the Court ordered delay in payment to Mrs. Pailin, Mrs. Pailin received the funds due her. That the amount of funds due Mrs. Pailin was based upon a balance statement prepared December 15, 1979, showing expenditures made in this matter. That the Respondent had made efforts to locate Mr. Pailin to pay him but had been unsuccessful in locating him and he had not been paid. That the Respondent may or may not have been told of the efforts made by Veterans Administration to locate Mr. Pailin and the subsequent location of Mr. Pailin by Veterans Administration.[4]

That subsequent to the payment to Veterans Administration, the Respondent made other payments by checks from the Trust Account No. 3-0 45-803, which account was not specifically marked as a Veteran Administration Account, which were not recognizable by Mr. Fallon, the representative from Veterans Administration. That Veterans Administration had no concern with expenses connected with the foreclosure on said property; that there may have been legal and other expenses connected with the foreclosure as well as settlement expenses with the purchaser and that Veterans Administration looked only for payment of its own lien and for a statement of final distribution.

That with reference to the checks written after the receipt of the proceeds of the foreclosure sale representing payments made from the Trustee Account, the representative

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[4]Upon learning of the address of Mr. Pailin from Veterans Administration, funds due Mr. Pailin were remitted to him on December 15, 1982. (Petition for Hearing *En Banc* page 9).

Administration could not identify them as being inappropriate payments, and that those payments were of no particular concern to Veterans Administration because the agency had no concern of daily activities of the Respondent for property which no longer owner by it.

REASON FOR GRANTING THE WRIT

A. Where a new definition is adopted for Disciplinary Rule 9-102(A) and the prescribed sanction thereunder is disbarment, to apply the standard and sanction to conduct which occurred prior to the adoption of the new definition is a violation of the Fifth Amendment to the United States Constitution and has *Ex Post Facto* implications...

Bar Counsel charged the Respondent with a violation of Disciplinary Rule 9-102(A).

In proof of his case, Bar Counsel neither called nor presented witnesses with respect to the charge but relied upon the Exhibits which were Bank Statements and Cancelled Checks of the Respondent, admitted in evidence over the objection of the Respondent.

In his opening statement, Bar Counsel stated that "Respondent's unauthorized withdrawal from the trust account for purposes and uses totally unrelated to the trust violated Disciplinary Rule 9-102(A), *because he failed to mention the trust proceeds in a trust account as required by that disciplinary rule*."

At the Conclusion of the Hearing, the Chairman in addressing himself to Bar Counsel, stated, "As I understand it, one of the disciplinary rules which Bar Counsel contends has been violated here is Disciplinary Rule 9-102, which is styled, preserving *identity of funds and property of a client*, is that correct?"

Bar Counsel Answered, "That's correct".

Despite reliance upon and defense of the charge of Commingling by the Respondent, after close of the hearing, Bar Counsel in his Post Hearing Brief informed the Hearing

Committee and the Board for the first time that it had proceeded on the theory that Respondent's Misappropriation, conversion and commingling of trust funds violated Disciplinary Rule 9-102(A)." (See Bar Counsel's Post Hearing Brief, pg. 4)

In other cases, misappropriation as distinct from commingling has been charged under DR 1-102(A)(4). See, e.g., *In the Matter of Burka*, 423 A 2d 181, 183, 186-187 (D.C. App. 1980) (*en banc*). Bar Counsel did not in the charge in M-143-82, intend it to be more than commingling and indicated as much upon inquiry by the Chairman of the Hearing Committee. *(Anderson vs. Burton)*.

Bar Counsel conceded the charge of commingling only, when he asserted at page 3 of his Opposition to the Petition *En Banc*, "In any event, although Respondent was not charged with DR 1-102(A)(4) in No. M-143-82, (hereinafter the *Anderson* case), he was charged with DR 1-102(A)(4) in No. M-83-192 (hereinafter the *Pailin* case", "---."

In June, 1983, in *In Re Harrison*, 461 A.2d 1034 (D.C. 1983), the Court below prescribed for the first time in this jurisdiction, the definition and sanction which is to be applied to Misappropriation cases with the newly numbered Disciplinary Rule, 9-103;

The Court below in adopting the findings of the Board on Professional Responsibility has fostered a new concept which not only allows Bar Counsel to raise Post Hearing, the level of a charge against a Respondent and a charge which the Respondent had no opportunity to defend but the Court's findings, further allowed the Board of apply to definition which was newly adopted and not in effect at the time of the alleged misconduct complained of herein.

The application by the Court of the newly adopted defini-

tion which should not have been applied to the Respondent inured to the prejudice and detriment of the Respondent and was violative of his due process rights and equal protection of the law.

The application of the *Harrison* definition to the Pailin case (No. 83-492), even if that case is supported by substantial evidence, allowed for an *Ex Post Facto* application of a Rule not in effect at the time of the alleged misconduct and is a violation of the due process requirement of the Fifth Amendment.

In *In re Ruffalo*, 390 U.S. 544, 551 (1968), this court held that disciplinary proceedings against attorneys "are adversary proceedings of a quasi-criminal nature..." Because such proceedings may result in "a punishment or penalty imposed on the lawyer...[h]e is accordingly entitled to procedural due process..." *Ruffalo, supra*, 390 U.S. at 550. Thus, the privilege of practicing law is not "a matter of grace and favor", but rather a right that cannot lightly or capriciously be taken from an attorney; the power to withdraw that right "ought always to be exercised with great caution". *Charlton v. F.T.C.*, 543 F.2d 903, 906 (D.C. Cir. 1976), citing *Wilner v. Committee on Character and Fitness*, 373 U.S. 96, 102 (1963); *Ex Parte Wall*, 107 U.S. 265, 288 (1883); and *Ex Parte Garland*, 72 U.S. (4 Wall) 333, 379 (1867).

It is submitted that the issue of whether the application of the newly adopted Harrison definition to the instant case denied the Respondent due process required in these matters and whether the application of the Standard had *ex post facto* implications are sufficiently important in the handling of disciplinary matters to merit this Court's attention.

B. When a newly adopted sanction for disciplinary Rule 9-102(A) is that of disbarment and the sanctions imposed by different panels of the Court ranges from suspensions to disbarment for similar conduct, the disparity in the imposition of sanctions is a violation of the Fifth Amendment.

In June, 1983, one panel of the Court in the case of *In Re Harrison*, 461 A.2d 1034 (D.C. 1983), announced the definition and sanction for misappropriation which is to be applied in this jurisdiction. Until that time, there was no clear cut definition of misappropriation for the District of Columbia as corroborated by an article published by Bar Counsel which appeared in the "*Legal Times*" dated, February 6, 1984, wherein Bar Counsel stated that the Bar had asked the Court of Appeals to announce that in the future, misuse of client's funds will result in disbarment.

The ruling by that panel of the Court in adopting the *Harrison* definition, ordered by the imposition of a sanction less than disbarment, yet another panel of the Court, imposed a sanction in the case at bar end and in one other case, (*In Re McLean* No. M-142-82, January 11, 1983) which was at odds and in conflict with the Harrison sanction as well as the sanction imposed in *In Re Cefarratti,* No. M 140-82, decided June 28, 1983 and in *In Re Hines*, Docket Nos. 194-80 and 447-79 (BPR October 28, 1982). The effect of these Rulings has resulted in an inharmonious ruling from different panels of the Court and a review by this Court is needed to clarify for the bar at large the applicability of the *Harrison* definition and the imposition of sanctions with respect thereto.

Moreover, except for the cases of *In the Matter of Quimby,* 123 U.S. App. D.c. 273, 359 F.2d 257 (1966), in which this Board and Court did not participate, the case of *In the Matter of Burka*, 423 A 2d 181 (D.C. App. 1980) (*en banc*), where the Respondent was charged with and found to have violated DR 9-102 (A) and (B) and DR 1-102 (A) (4) and (5), where funds were withdrawn from an Conservatorship Estate Account and *In Re McLean*, No. M 142-82, April 11, 1983, where the Respondent misappropriated funds from negligence and workmen's compensation cases, all other White Attorneys charged with similar conduct as the Respondent have received lesser sanctions.

It is particularly noticeable that the Respondents in the foregoing matters, all of whom were White, received lesser sanctions and those sanctions should be contrasted with the sanction imposed upon the Respondent herein, who is a Black Attorney. (In The Case of *In Re Newsome,* No. D 34-79 (D.C. November 21, 1979) who is Black, disbarment arose because of a conviction in the United States District Court involving funds from a negligence case).

Moreover, in light of the Court's opinion in *In Re Harrison*, supra, where the Court announced a definition for misappropriation *for the first time* in this *jurisdiction* it would appear that along with the disproportionate sanction imposed upon White Respondents for similar violations, that the Court applied its definition of misappropriation retroactively and inappropriably applied the *Harrison* definition to conduct which was not so clearly defined at the time of the occurrence.

These factors warrant the Court giving this matter its attention by granting the request for a Writ of Certiorari.

C. Where the Board on Professional Responsibility uses evidence of a prior adjudicated disciplinary proceeding to assist it in reaching a determination in a new and unrelated proceeding, the doctrine of estoppel is applicable and the due process requirement of the Fifth Amendment is violated.

The decision by the District of Columbia Court of Appeals appears to sanction the right of Bar Counsel to bifurcate proceedings and proceed at its discretion to elicit testimony from a Respondent on a matter which it did not charge, when it could have brought both charges against the Respondent at the same time.

In the Anderson matter the Respondent was cross-examined extensively on the Pailin Matter, which matter was not charged in that proceeding by Bar Counsel, although Bar Counsel had complete and total knowledge of the circumstances of that matter.

The following portions of the Transcript of the cross-examination by Bar Counsel amply demonstrates this fact.

Q. And you wrote the check to a former client, Mrs. Pailin?
A. Well, Mrs. Pailin was not a client of mine.
Q. Oh, I understand, I withdraw that question?
A. But, I wrote it as a result of a transaction that evolved.
Q. You owed her the money?
A. Yes sir.
Q. You owed her $3,300.00 and maybe some more money at the time that you wrote her this check inadvertently, is that correct?
A. Yes.

Q. And you wrote that check on the 14th day of November, is that correct?

A. Yes.

Q. You testified that when you wrote the check to her inadvertently, that you really didn't know that you didn't have enough funds in the other account?

A. No, sir, I didn't say I didn't know. I said at the time I didn't know whether I did or did not, I just didn't know. All I could fathom on at that time was writing the check. Mentally, you know, you've gone through things in a Court recess, you're thinking, and all I can remember is trying to...I know I put in 5,000 in that account in a 15-day period or so, I knew it was 4,000 or 5,000 and I just thought that it might have been there.

Q. Did you owe Mr. Nathaniel Pailin as a result of your transaction?

A. Yes.

Q. Had you paid him at the time you had wrote this check to Mrs. Pailin?

A. I have not paid Mr. Nathaniel Pailin because I don't know where Mr. Nathaniel Pailin is.

Q. Did you...

A. Yes, I wrote Mr. Nathaniel Pailin a letter.

CHAIRMAN MILLER: Just a second, let Mr. McClendon ask the question before you answer.

Q This is your Exhibit #2, would you read the last paragraph?

Q. First of all, would you give the Committee the date of this letter?

A. The date of the letter is September 17th, 1979, and it says, "Finally, I understand that the delay in the dis-

tribution of the balance of the foreclosure proceeds are occasioned by the inability to locate Mrs. Pailin's husband. I've taken the liberty of contacting the Department of the Army, Retired Personnel Locator, about Mr. Pailin. That office carries his address as follows: S.F.C. Nathaniel Pailin, Retired, 809 West 232nd Street, Apartment 2B, Torrance, California 90502. Please do not hesitate to call me if any further questions arise in this matter."

Q. Did you make any efforts to contact Mr. Pailin?

A. Yes, sir. On two occasions I wrote letters; only one of which came back. In the meantime, I also picked up the telephone one day in an effort to try to get a number for him at that address; was unable to do so.

Q. You received this document, apparently from the Department of Army; did you ever contact the Department of Army to see whether or not they had a more recent address for Mr. Pailin?

A. No, this from the Office of the United States Attorney.

The question which should be considered by this Court, is to what extent should this procedure be permitted and does this procedure, if permitted, guarantee the Bar at large the fairness dictated by the Due Process Requirement in Disciplinary Proceedings.

D. Where Disciplinary Rule, Chapter 8, Section 3(1)C grants a Respondent a right to challenge hearing panel members, it is a violation to the due process clause of the Fifth Amendment and the Sixth Amendment rights of a Respondent to deny him the right to conduct a *Voir Dire* of the hearing panel members.

Disciplinary Rule, Chapter 8, Section 3(1)C, provides a following:

> "The chairman shall then identify himself and the other members of the Committee and inquire if there are challenges to any member of the Committee".

Chapter 8, Section 3(1)D, provides as following:

> "Should challenges result in the departure of the Chairman---"

Implicit within these Rules is the requirements that information may be gained from the panel members through *voir dire* examination which would provide an intelligent basis for the exercise of challenges. Despite having information and knowledge of the panelist backgrounds and assuming that investigation of their background was had, the information gained through the investigation is meaningless without the opportunity too further explore the leads derived through investigation, which may lead to the challenge of a panel member.

If the Respondent is to obtain full knowledge of all relevant and material facts that might bear on the disqualification of a panel member, then *voir dire* examination of the panel members is essential, so that, the Respondent may fairly and intelligently exercise the right to challenge.

It has been said that the ultimate function of voir dire examination is to explore the nuiances of conscience to determine whether a prospective person is able to participate fairly in the deliberations on the issues, confining his judgment to the facts presented. *Crawford v. Bounds*, (CA 4 NC) 395 F.2d 297.

The denial of the Respondent's right to *voir dire* examination of the panel members violated not only the Rules of Procedure adopted by the Board on Professional Responsibility but it also violated the District of Columbia Code at § 13-701 and Section 23-107.

District of Columbia Code, Section 13-701(C), provides:

> C. This section does not deprive a person of the right to challenge the array or poll of a panel returned, or to have all or any of the jurors examined on their *Voir Dire* before the list is prepared to determine their competency to set in a particular case.

The right of challenge has its source in the common law, and has always been an essential ingredient of a jury trial and has been codified in the D.C. Code at 13-701 and 23-107. The District of Columbia Court of Appeals, no doubt had in mind, when it promulgated the rule which allows for a challenge, to also allow *voir dire* examinations of the panel members so as to insure that an accused Respondent would have a fair and impartial hearing that is mandated by case law in matters of this type. See *In Re Thorup*, 432 A 2d 1221 (D.C. 1981), citing *Charlton v. Federal Trade Commission*, 177 U.S. App. D.C. 418, 543 F2d 903, (1976).

This Court obviously does not want to curtail this right and therefore this Court should make a determination concerning the meaning and implication of the Disciplinary Rule, Chapter 8, Section 3(1)C, so as to afford an optimum of due process in Disciplinary Proceedings.

> E. Where the Court has been requested to consider referring a matter concerning the conduct of a Court appointed Trustee to the Board on Professional

Responsibility, but does not do so, the Board on Professional Responsibility does not possess quasi-judicial authority to empower it to conduct a hearing on the conduct of the court appointed trustee.

Section 4(3)(a) of Rule XI of the District of Columbia Court of Appeals for the Governance of the Bar states:

(3) The Board shall have the power and duty:

(a) to consider and investigate any alleged grounds for discipline or alleged capacity of any attorney called to his attention, or upon its own motion, and to take such action with respect thereto as shall be appropriate to effect the purposes of these Disciplinary Rules.

Under this Rule, it appears that a referral by the Superior Court or any person concerning the conduct of an attorney is not necessary to give the Board jurisdiction to consider and investigate an attorney's conduct.

The Auditor-Master's Report herein contained a recommendation that the Court consider the advisability of referring the matter to the Office of Bar Counsel for appropriate action by Order dated, March 11, 1981, the Superior Court ratified the Auditor-Master's Report dated February 12, 1981.

In ratifying the Auditor-Master's Report, the Court did not refer the matter to Bar Counsel and made no reference to the Auditor-Master's recommendation of referral.

The Board found that:

"In our view, neither we nor the Board of Professional Responsibility is precluded from reviewing respondent's conduct because the court did not specifically refer the matter to the Office of Bar Counsel. The Court, in ratifying

the Auditor-Master's report, did not purport to make a determination whether Respondent breached his fidicuary duty as trustee. The court's order is silent with regard to whether Respondent's conduct warranted a referral to the Office of Bar Counsel, and no inference properly can or should be drawn from that silence. Thus, the court's action in this regard does not preclude this Committee from determining whether Respondent's conduct was in violation of the Code of Professional Responsibility. Nor does the court's action constitute a determination that Respondent breached his duties as trustee."

The Superior Court of the District of Columbia has general equity powers in matters pertaining to Trustees. *D.C. Code Section 11-921, 1973 Edition*, as Amended. These powers apply to the appointment of Trustees, their removal, discharge of Trustees and the settlement of their accounts.

The Court has supervisory control over any matter which concerns the trust, its Administration, its preservations and its disposition and any other matter wherein Trustees are affected in the discharge of their duties toward the trust.

Therefore, when the Court has exercised its supervisory powers and ordered a Trustee discharged as in the instant case, without referring the matter to the Board as recommended, the Court has passed upon the performance of the Trustee toward the trust and the Board may not second guess the Court without subverting the Court's authority.

That the Court did not purport to make a determination of whether the Respondent breached his duty as the board contends is untenable, so is the contention that no inference may be drawn from the silence of the Court on the matter of the referral, in its Order of Ratification of the

Auditor-Master's Report. To adopt the aforesaid contentions is paramount to charging the Court with negligence or misfeasance. In fact, the Court having before it the request to consider referral, giving due interpretation to the appointing Order and its requirement that the Respondent pay the funds into the Registry of the Court, observed that the duties and responsibilities of the Respondent had been fulfilled and saw no need to refer the matter to Bar Counsel.

Moreover, submission of the report to Auditor-Master for auditing purpose was surplusage.

The presumption prevails that the Court did its duty. In fact, the board impugned the integrity and sagacity of the Court. For the Court below to have affirmed the findings of the Board concerning the non-referral, undercuts the authority of the Superior Court and this Court's review is warranted in order to preclude the decision from having far reaching consequences.

F. Where the Board on Professional Responsibility makes a finding that substantial evidence was present to support its findings but the evidence it considered was not clear and convincing, the Board on Professional Responsibility has not afforded a Respondent due process as required in disciplinary proceedings.

In Bar Docket No. 224-79, Appeal No. 83-492, Bar Counsel did not show by clear and convincing evidence that misappropriation had occurred. This conclusion is true, despite the introduction of some checks from the trust account with payees name which appeared to be indecipherable.

In substantation of this conclusion the Veterans Representative testified that he saw or could find no evidence of wrong doing.

Mr. Fallon, the Veterans Administration Representative, stated that the duties of the Trustee were to pay off the liens, take out the expenses of the foreclosure, and distribute the surplus top the mortgage holder and that was all that was required. Further that Veterans Administration was paid and Mrs. Pailin was paid; the Respondent was having difficulty finding Mr. Pailin and that he did not handle the portion of the case relating to advising the Respondent of the address for Mr. Pailin.

Further he offered testimony to the effect that:

> "Again, I don't see where that would be of a particular concern to the Veterans Administration, other than ultimately to know about it, because we feel that we have no obligation to know the terms of the Deed of Trust in which we are the holder and have appointed a substitute trustee have been carried, but we would not expect Mr. Burton to tell us his daily activities in connection with the property that did not belong to us any more".

The Hearing Committee was persuaded by this testimony because it concluded:

> "1. That the case relied upon by Bar Counsel, In the *Matter of Quimby*, III, 359 F2d (D.C. Cir 1966) went far beyond the bare bones financial records of the accused and that in this matter the evidence against the Respondent is limited to the bank records of a particular trust account with no testimony.

"2. That there was no other evidence showing the ultimate use or purpose of the withdrawals from the trust account causing it to be less than the amount due to the Veterans Administration and the Pailins.

"3. The individuals who received checks drawn on the bank account were not called as witnesses.

"4. No testimony is in the record to show to what extent the funds were used for the Respondent's personal use.

"5. There was no testimony or other evidence in the form of an analysis of the Respondent's client's accounts on which to evaluate the extent of Respondent's misuse of client's funds and

"6. The evidence herein consist primarily of the barebone bank account records, which standing alone, do not permit an informed judgment.

The Court adopted the findings of the Board without comment with respect to these findings. In a matter of disbarment with rudiment of due process and equal protection of the law under the Constitution, whose livelihood is being deprived, require a greater standard upon review than merely adopting the findings based upon a substantial evidence test.

This Court's attention should be directed to the standard of review required of the Court in considering disciplinary proceedings.

G. In reviewing a disciplinary proceeding, the due process provision of the Fifth Amendment requires both the Board on Professional Responsibility and the District of Columbia Court of Appeals to utilize a standard greater

than the substantial evidence test in order to support its findings.

Matters of Attorney discipline are, the ultimate responsibility of the District of Columbia Court of Appeals. *In Re Dwyer*, 399 A.2d 1, 11-12 (D.C. App., 1979) Citing Sections 11-2502 and 11-2503(b), D.C. Code, 1973; (*F Powell v. Nigro*, 543 F. Supp. 1044, 1046 (D.C. 1982). This responsibility cannot be relegated to the Board of Professional Responsibility by delegating it to the Board and then allow the Court to utilize a standard of review similar to that used when reviewing a decision of an administrative agency.

In the case of *In Re Colson*, 412 A.2d 1160, 1175 (D.C. App. 1979), the dissent therein demonstrated the aforesaid view when it was stated, "the basic decisional responsibility for the sanction to be imposed in a disciplinary proceeding should rest upon the judges of a jurisdiction's highest Court, rather than upon the members of a Court-created disciplinary body. After all, our Board of Professional Responsibility *is not akin to an Administration Agency*". (Emphasis Supplied).

In the instant case, the District of Columbia Court of Appeals used a standard based upon the "substantial evidence test.

In *Addington v. Texas*, 441 U.S. 418, 423 (1979, this Court, citing its earlier decision in *In Re Winship*, 397 U.S. 358 (1970), stated that "a standard of procedure is embodied in the Due Process Clause", and that the function of such a standard is to "instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type adjudication".,

The Court in *Addington* described as one of the three levels of standard of proof, thusly:

> "The intermediate standard...usually employs some combination of the words 'clear,' 'cogent,' 'unequivocal,' and 'convincing,'... One typical use of standard is in civil cases involving allegations of fraud or some other quasi-criminal wrong doing by the defendant. The interest at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof. Similarly, this Court has used the 'clear, unequivocal and convincing' standard of proof to protect particularly important individual interests in civil cases...(deportation) ...(denaturalization)..." 441 U.S. at 424-425.

In *In Re Ruffalo*, 390 U.S. 544, 551 (1968), this Court held that disciplinary proceedings against attorney's "are adversary proceedings of a quasi-criminal nature..." Because such proceeding may result in "a punishment or penalty imposed on the lawyer...[h]e is accordingly entitled to procedural due process..." *Ruffalo*, supra, 390 U.S. at 550. Thus, the privilege of practicing law is not "a matter of grace and favor", but rather a right that cannot lightly or capriciously be taken from an attorney; the power to withdraw that right "ought always be exercised with great caution". *Charlton v. F.T.C.*, 543 F2d 903, 906 (D.C. Cir. 1976), citing *Wilner v. Committee on Character and Fitness*, 373 U.S. 96, 102 (1963); *Ex Parte Wall*, 107 U.S. 265, 288 (1983); and *Ex Parte Garland*. 72 U.S. (4 Wall) 333, 379 (1867).

Applying this Court's decision in *Ruffalo,* and *Addington* to Attorney disciplined proceedings, I submit that a substantial evidence test does not pass constitutional muster. Given that such discipline imposes a punishment or penalty on the lawyer, *(Ruffalo; supra*), and taking into consideration that disbarment, that is, the taking away of the livelihood and the right to practice law, great caution ought be exercised when dealing with a curtailment of that right. (*Charlton v. F.T.C., Supra*). Accordingly, when reviewing findings of the Board by the District of Columbia Court of Appeals nothing less than utilization of the "Clear and convincing" standard can be said to provide due process.

CONCLUSION

For all of the reasons set forth herein, Petitioner request that this Court grant this Petition and issue a Writ of Certiorari to the District of Columbia Court of Appeals.

Respectfully submitted,

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Dated: May 2, 1984